BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAYED WAKEEL MAYHENMAHR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,340
SEDGWICK COUNTY	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the October 8, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to have suffered accidental injuries which arose out of and in the course of his employment with respondent. The ALJ further ordered respondent to submit a list of three physicians from which claimant was to select the authorized treating physician for the treatment of claimant's bilateral lower extremities.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent appeared by its attorney, Robert G. Martin of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held October 7, 2010, with attachments, and the documents filed of record in this matter.

ISSUE

Did claimant meet with personal injury by accident which arose out of and in the course of his employment with respondent? Respondent argues that claimant's bilateral knee injuries are the result of the normal aging process and/or arose from the normal activities of daily living and, therefore, are not compensable under the Kansas Workers Compensation Act (Act). Claimant argues that his job duties required that he be on his feet 90 percent of the day, which is more than the normal activities of his daily living.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had worked for respondent as a detention deputy sheriff for over 10 years. Claimant's job duties required that he spend approximately 10 to 15 percent of his workday on his feet. Beginning in approximately March of 2009, claimant was placed on modified duty which was titled as a rover position. This modified duty required that claimant walk on metal and concrete surfaces nearly 90 percent of his workday. At some point in 2009, claimant began noticing problems with his knees. There was no specific incident that he could identify, just the daily grind of walking on the hard surfaces. Claimant testified that he had suffered no outside traumas to his knees, other than the walking at work.

Claimant went to Dr. Blackman, his family doctor and was provided with lotions and ointment for his knees. The treatment was not beneficial. X-rays were taken, which displayed early mild degenerative change of the knees, but no significant abnormality was noted. Claimant was referred for physical therapy and advised to use over-the-counter ibuprofen.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., on August 4, 2010. Dr. Murati diagnosed claimant with bilateral patellofemoral syndrome and recommended restrictions including work as tolerated; cortisone injections; possible Synvisc injections; and knee braces and/or taping; along with anti-inflammatory medications. Dr. Murati cautioned that claimant may need bilateral knee replacements in the future. Dr. Murati opined, in his report of August 4, 2010, that claimant's bilateral knee problems are the direct result of the injuries suffered while working for respondent.

James Convey, an administrative lieutenant with respondent, testified on behalf of respondent. Mr. Convey was a 15-year employee of respondent. Mr. Convey acknowledged that the position of rover could entail a significant amount of walking, depending on the motivation of the particular employee. He agreed that claimant's estimate that there were 15 to 20 flights of stairs which an employee would be required to walk was accurate. There is no direct policy on the number of rounds an employee is required to make. Employees are encouraged to make as many rounds as they can. Mr. Convey also stated that respondent supplies the shoes used by its employees. He acknowledged that he did not know how many times claimant would make his rounds or what daily activities claimant participated in.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

K.S.A. 2008 Supp. 508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where

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[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Respondent contends that claimant's bilateral knee problems stem, not from his work for respondent, but from the natural aging process and the normal activities of day-to-day living. However, claimant was transferred from a job that required walking 10 to 15 percent of the time to a job that requires that he be on his feet up to 90 percent of the time. It would be an unusual life for someone to be on his or her feet 90 percent of his or her normal day. In this instance, it is held that apart from work, this claimant would not normally spend 90 percent of his day on his feet walking on concrete or metal surfaces. Therefore, a job that required an employee to be on his or her feet for that extensive amount of time would be abnormal, and would not fall under the exclusion set forth in K.S.A. 2008 Supp. 44-508(e). The award of benefits by the ALJ would, therefore, be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that he suffered a series of accidents which arose out of and in the course of his employment with respondent, and the award of benefits by the ALJ should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 8, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[5] K.S.A. 44-534a.

Dated this ____ day of December, 2010.

HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant
Robert G. Martin, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge